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Mardani bin Hussin v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — RAYUAN JENAYAH NO W–05–76 OF 2005
JAMES FOONG, ABDUL MALIK ISHAK AND ABU SAMAH JJCA
8 MAY 2009

C

Criminal Procedure — Trial — Misdirection — Whether accused prejudiced — Whether substantial miscarriage of justice done — Judge held accused's failure to disclose defence to police at time of arrest made defence in court incredible — Whether judge wrong to call for defence solely to know why accused perpetrated act — Whether wrong standard of proof applied to determine if reasonable doubt on prosecution's case raised

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The appellant was charged in the High Court with trafficking in 927g cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952. After he had made his defence under oath, the appellant was found guilty and sentenced to death. He appealed the decision to the Court of Appeal. According to the prosecution's version of the events, the appellant was arrested by a police party which arrested him when he alighted off a motorcycle in front of a house in Jalan Raja Mahmud while holding a newspaper package. The package contained the cannabis. The appellant denied this version of the events in his defence. He said he was merely doing his friend, whose shop was 300 metres away from the place he was arrested, a favour by delivering the motorcycle to one Mohd Nor at the said house and that when he took the motorcycle all he saw in its carrier was a shirt and nothing else. He said when he reached the house and before he alighted he was confronted by the police. He denied he was holding a newspaper package at the time. Three main grounds of appeal were dealt with: (i) that the trial judge was wrong in holding that because the appellant remained silent at the time of his arrest, it was too late for him to raise his defence at the trial; (ii) that the trial judge erred in calling for the defence solely because he wanted to know why the appellant perpetrated the act; and (iii) that the trial judge applied the wrong standard of proof to determine whether the defence had raised a reasonable doubt on the prosecution's case.

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Held, allowing the appeal:

(1) The trial judge criticised the appellant for not disclosing his defence to the police at the time of his arrest and held that because of that non-disclosure it was too late for him to raise his defence at the trial. This was a serious misdirection in law (see para 11).

I

(2) The trial judge expected the appellant to be forthright with the police at the time of his arrest. When the appellant narrated his defence from the witness box the trial judge held it was a mere afterthought and unbelievable simply because of the appellant's non-disclosure to the police at the time of his arrest. This approach was wrong and a serious misdirection that has gravely prejudiced the appellant and occasioned a substantial miscarriage of justice (see paras 12 & 16).

(3) It was quite apparent that when the trial judge called upon the appellant to enter his defence it was for the sole purpose of listening to the appellant's explanation as to why he perpetrated the act. This approach was wrong in law and a serious misdirection entitling the setting aside of the conviction (see paras 19–20 & 26).

(4) It was correct to say that a prima facie case was made out or that the defence ought to be called not because the judge was interested in knowing why the appellant perpetrated the act of wrong doing but because the prosecution's evidence adduced through the witnesses had satisfied the appropriate legal tests (see para 24).

(5) The trial judge erred when he said the appellant failed to discharge the 'evidential burden' of raising a reasonable doubt on the prosecution's case. The appellant only had the evidential burden of rebutting the statutory presumption of trafficking on the balance of probabilities. The burden of rebutting the statutory presumption was heavier than the burden of casting a reasonable doubt on the prosecution's case (see para 29).

Perayu dituduh di Mahkamah Tinggi dengan mengedar dadah kanabis sebanyak 927g di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Selepas dia membuat pembelaan dengan mengangkat sumpah, perayu didapati bersalah dan dihukum mati. Dia merayu keputusan tersebut ke Mahkamah Rayuan. Mengikut versi pihak pendakwaan mengenai kejadian tersebut, perayu ditangkap oleh pihak polis yang menangkap dia semasa dia turun dari motosikal di hadapan rumah di Jalan Raja Mahmud ketika memegang paket suratkhabar. Paket tersebut mengandungi kanabis. Perayu menafikan versi kejadian ini dalam pembelaannya. Dia berkata dia hanya menolong kawannya, yang mana kedainya sejauh 300 meter dari tempat dia ditangkap, menghantar motosikal kepada seorang yang bernama Mohd Nor di rumah tersebut dan bahawa semasa dia menunggang motosikal apa yang dia nampak di dalam tempat membawa barang adalah baju dan tiada apa yang lain. Dia berkata semasa dia sampai ke rumah tersebut dan sebelum dia turun daripada motosikal dia berhadapan dengan pihak polis. Dia menafikan dia memegang paket suratkhabar pada masa tersebut. Tiga alasan rayuan utama yang dibicarakan: (i) bahawa hakim perbicaraan salah dalam memutuskannya kerana perayu kekal berdiam diri pada masa penangkapannya, ia adalah terlalu lambat untuk dia membangkitkan pembelaannya pada masa perbicaraan; (ii) bahawa hakim perbicaraan tersilap di dalam memanggil untuk pembelaan

semata-mata kerana beliau hendak mengetahui mengapa perayu melakukan tindakan tersebut; dan (iii) bahawa hakim perbicaraan menggunapakai standard pembuktian yang salah untuk menentukan sama ada pembelaan telah membangkitkan keraguan munasabah terhadap kes pihak pendakwaan.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan mengkritik perayu kerana tidak mengemukakan pembelaannya kepada polis pada masa penangkapannya dan memutuskan bahawa disebabkan oleh kegagalan penzahiran tersebut ia adalah terlalu lewat untuk dia membangkitkan pembelaannya pada masa perbicaraan. Ini adalah salah arah dalam undang-undang yang serius (lihat perenggan 11).

(2) Hakim perbicaraan menjangka perayu akan berterus terang dengan polis pada masa penangkapannya. Apabila perayu menceritakan pembelaannya daripada kandang saksi hakim perbicaraan memutuskan ia hanyalah sesuatu yang difikirkan kemudian dan tidak boleh dipercayai disebabkan oleh kegagalan penzahiran perayu kepada polis semasa dia ditangkap. Pendekatan ini adalah salah dan salah arah yang serius yang telah memprejudiskan perayu dan telah menyebabkan ketidakadilan yang substansial (lihat perenggan 12 & 16).

(3) Ia adalah jelas bahawa apabila hakim perbicaraan memanggil perayu untuk memasukkan pembelaannya ia adalah untuk satu-satunya tujuan mendengar penjelasan perayu mengapa dia melakukan tindakan tersebut. Pendekatan ini adalah salah dari segi undang-undang dan salah arah serius memberikan hak untuk mengetepikan sabitan (lihat perenggan 19–20 & 26).

(4) Ia adalah betul untuk menyatakan bahawa kes prima facie telah dibuat atau bahawa pembelaan patut dipanggil bukan kerana hakim berminat untuk mengetahui mengapa perayu melakukan tindakan salah tersebut tetapi oleh sebab keterangan pihak pendakwaan yang dikemukakan melalui saksi-saksi telah memenuhi ujian-ujian undang-undang yang wajar (lihat perenggan 24).

(5) Hakim perbicaraan tersilap apabila beliau menyatakan perayu gagal melepaskan 'evidential burden' untuk membangkitkan keraguan munasabah atas kes pihak pendakwaan. Perayu hanya mempunyai beban keterangan mematahkan anggapan statutori mengedar dadah atas imbangan kebarangkalian. Beban mematahkan anggapan statutori adalah lebih berat daripada beban membangkitkan keraguan munasabah atas kes pihak pendakwaan (lihat perenggan 29).

Notes

For cases on misdirection at trial, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5253-5260.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Anthony James Hoare (1966) 50 Cr App R 166 (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
George Edward Tune (194) 29 Cr App R 162 (folld)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Mohd Hazrin bin Md Sari v PP [2008] 3 MLJ 798 ; [2008] 5 CLJ 361 (CA) (refd)
Rex v Leckey [1944] 1 KB 80 (refd)

Legislation referred to

Criminal Procedure Code s 180
Dangerous Drugs Act 1952 s 2, s 37(da), s 39B(1)(a)

Appeal from: Criminal Trial No 45–23 of 2003 (High Court, Kuala Lumpur)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Jamhirah Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA (delivering judgement of the court):

[1] The appellant was charged for trafficking in dangerous drugs, to wit, 927g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the same Act. The appellant claimed trial. At the end of the prosecution's case, the learned trial judge called the appellant to enter his defence.

[2] The appellant gave evidence under oath from the witness box and at the end of the defence case, the learned trial judge found the appellant guilty and convicted the appellant. The learned trial judge sentenced the appellant to death and that was the mandatory sentence required under the law.

[3] We heard the arguments and we allowed the appellant's appeal. We quashed the conviction, set aside the sentence of death and acquitted and discharged the appellant. The appellant was set free. We now give our reasons.

[4] The brief relevant facts are as follows. On 22 October 2002 at about 9pm, ASP Abdul Jabbar bin Mohd Hanifah ('SP4'), acting on information received, laid an ambush at Jalan Raja Mahmud. SP4 divided his ambush party into two groups. The first group comprised of Sub-Inspector Khabri bin Dollah ('SP5') together with Sergeant Karim and Corporal Jaafar. This first

group was headed by SP4 and this group waited near a lamp post. The second group comprised of other police personnel and they were located across the road.

[5] It was not a long wait. At about 9.30pm, the appellant arrived at the scene riding a motorcycle bearing registration No WJY 9620 from the opposite direction from where SP4 and his first group was waiting in observation. The appellant was seen crossing the road and stopped his motorcycle in front of house No 50, some ten or 15 feet away from SP4. The appellant then alighted from his motorcycle and was seen holding, in his right hand, a newspaper package. The police party then approached the appellant. SP4 introduced his office and placed the appellant under arrest. The appellant looked stunned and frightened upon being confronted by SP4.

[6] The newspaper package was seized from the appellant and, upon inspection, SP4 found the newspaper package to contain a slab of cannabis wrapped in an aluminium foil and a transparent plastic wrapper tied together with a red string. One corner of the slab had been cut thereby exposing its contents.

[7] The government chemist ('SP2') confirmed the weight of the cannabis to be 927g, a dangerous drug within the meaning of s 2 of the Dangerous Drugs Act 1952.

[8] In his defence, the appellant denied the version of the events advanced by SP4. According to the appellant, in his defence, that on the night in question he was with his friend by the name of Roy. According to the appellant, Roy sold cassettes and compact discs. It was Roy who requested the appellant to return the said motorcycle to Mohd Nor at house No 50 which was about 300 meters away from Roy's shop. The appellant agreed with Roy's request. According to the appellant that when he took the said motorcycle he only saw a shirt in the carrier of the said motorcycle and nothing else. And when he reached house No 50 and before he alighted from the said motorcycle he was confronted by the police. The appellant said that as an illegal immigrant he felt frightened when SP4 introduced his office to him. The appellant also denied that he was holding the newspaper package in his hand.

[9] The petition of appeal listed several grounds but it would be ideal to highlight some of these grounds. I will now allude to these grounds not in its chronological order.

THE FIRST GROUND

[10] It is worded in this way. That the learned trial judge unfairly criticised

the appellant for remaining silent and that it was wrong for the learned trial judge to hold that because he remained silent at the time of his arrest, it was too late for the appellant to raise his defence at the trial.

[11] We perceive the first ground as a point of law. The learned trial judge criticised the appellant for not disclosing his defence to the police at the time of his arrest. We consider this to be a serious misdirection in law. We are of the view that the learned trial judge gravely erred when he held that because of the appellant's non-disclosure it was too late for the appellate to raise his defence at the trial. The relevant passage in the learned trial judge's judgment can be seen at pp 54–55 of the appeal record and that impugned passage was worded as follows:

> In the instant case, it must be noted that the accused had not, during the prosecution's case put across his defence that he was present in front of house number 50, merely to run an errand for Roy, i.e. to return Mohd. Nor's motorcycle. These two names had not been mentioned earlier by the defence. *Further there was no protest by the accused on his arrest. He had also not explained to the arresting officer why he was there and what he was doing with the motorcycle which he claimed to belong to Mohd. Nor. Roy ran a business only 300 meters from where he was arrested. Surely he could have brought the police to Roy for an explanation if he was truly ignorant of the cannabis found in his possession*. According to him Mohd Nor was in his house, at number 50, where he had stopped the motorcycle. *Again he could have told the police to immediately contact Mohd Nor to verify his story about the motorcycle. None of this was done. To now raise this in his defence is in my view too late. His story is nothing more than a mere afterthought, which this Court found to be unbelievable*.

[12] The learned trial judge expected the appellant to be forthright with the police at the time of his arrest. And when the appellant took the witness box and narrated the defence, the learned trial judge held that the defence was a mere afterthought and unbelievable simply because of the appellant's non-disclosure to the police at the time of his arrest. It was because of this non-disclosure that the learned trial judge held that it was too late to raise it in his defence. With respect, the approach adopted by the learned trial judge cannot be condoned. It was a wrong approach and cannot be sanctioned by us.

[13] The same scenario appeared in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209, (FC). In that case the learned trial judge criticised the appellant for non-disclosure of his defence in his cautioned statement and this made the learned trial judge to subsequently hold that there was sufficient time for the appellant to concoct the story. In setting aside the conviction and acquitting and discharging the appellant, the Federal Court held that it was a serious misdirection. Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court had this to say at p 216 of the report:

It is clear law that a judge must tread warily when commenting on the fact that an accused has chosen to conceal the lines of his defence until the trial, rather than disclosing them at or about the time of his arrest during police interrogation. He may observe that such a stance would make it difficult for the police to check the veracity of the accused's version of the facts, and so, detracts from the weight to be accorded to it (see *The King v William Littleboy* [1934] 2 KB 408; *R v Ryan* (1966) 50 Cr App R 144). That, however, is as far as he can go, for should he go further and infer that such non-disclosure provides a basis for assuming that the accused is guilty (see eg *R v Sullivan* (1967) 51 Cr App R 102; *R v Hoare* [1966] 2 All ER 846), he would be misdirecting himself in law.

Having said that, we must add that, when a judge has made an adverse comment about the belated stage at which an accused had made disclosure of his defence, without an accompanying statement that the accused was under no obligation to make such prior disclosure, and that he is not drawing an inference of guilt from the belatedness of the explanation offered, such comment would usually not be fair, and so would constitute a misdirection in law so serious that the conviction is liable to be quashed on this ground alone. In this context, we would draw attention to a recent decision of this court in *Teng Boon How v Pendakwa Raya* [1993] 3 MLJ 553, where many of the relevant authorities on this point are referred to and analysed.

[14] Gopal Sri Ram JCA (now FCJ) writing for this court in *Mohd Hazrin bin Md Sari v Public Prosecutor* [2008] 5 CLJ 361 (CA) had occasion to deal with the same point of contention. In that case, the learned trial judge also criticised the appellant for his non-disclosure of his defence to the police and in his cautioned statement. His Lordship set aside the conviction and acquitted and discharged the appellant and this was what His Lordship said (see pp 369–370):

Third, we accept as settled law that there is no duty on an accused to make any statement whether cautioned or otherwise to the police either upon or after his or her arrest. Accordingly, no adverse inference may be drawn against an accused for not making a statement to the police after his or her arrest. Although there are a number of authorities that support this proposition we consider it sufficient to refer to only one of them. In *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162, the learned president of the sessions court had construed the accused's silence as pointing to his guilty mind. In quashing the conviction on appeal, Syed Agil Barakhbah J (as he then was) said:

It has been held in a series of cases by the Court of Criminal Appeal in England that it was improper for the judge to invite the jury to make an inference against the accused person for his refusal to make a statement or for keeping silent after the caution had been administered (see *R v Norman Davis* 43 Cr App 2 R 215; *R v Naylor* 23 Cr App R 177; *R v Leckey* 29 Cr App R 128, etc). In all these cases, it was held that such inference amounted to a misdirection and the conviction in each case was quashed. In *Satkuru v Public Prosecutor* FM Criminal Appeal No 12 of 1960 (unreported), the Court of Appeal quashed the conviction of the appellant on similar but much stronger grounds. There was however an oral judgment delivered, but from the written additional grounds of appeal and notes on record, it appeared

that the learned trial judge in his grounds of judgment criticised the accused for his failure to give his version of the facts which he gave in evidence at the time he was arrested and at the preliminary enquiry notwithstanding the fact that the learned trial judge subsequently stated that he was putting it out of consideration. The English authorities cited appeared to have been followed.

[15] Continuing at p 370 of the report, His Lordship had this to say:

[10] Further, there is a serious misdirection by the learned judge in the passages already quoted. It is to be noted that the learned judge came to the conclusion that the appellant had failed to inform the police of the existence of Badrol Hisham or of his role in the case when a cautioned statement was first recorded from him by one Insp. Khairul Azhar. She came to that conclusion on the assumption that the statement did not contain the disclosure because the defence had not sought to adduce it at the trial.

[11] With respect, the aforesaid direction of the learned judge imposed upon the appellant a duty to speak which the law does not impose upon him. It is for this reason that we consider the observation of the learned judge on the point under consideration to be a serious misdirection. As we have already said, no adverse inference may be drawn against an accused for remaining silent upon his arrest.

[16] We say that the serious misdirection by the learned trial judge has gravely prejudiced the appellant and has occasioned a substantial miscarriage of justice as to warrant our interference.

THE SECOND GROUND

[17] It is phrased in this way. That the learned trial judge erred when His Lordship called the appellant to enter his defence because His Lordship wanted to know as to why the appellant perpetrated the act.

[18] This is certainly the perception which anyone reading the judgment of the learned trial judge would arrive at. The impugned passage can be found at p 48 of the appeal record and it was worded in this way:

From the above facts, I was satisfied that the prosecution had succeeded in proving a prima facie case. The accused was caught red handed, so to speak, holding the package containing cannabis. He was seen coming into Jalan Raja Mahmud on a motorcycle and was immediately apprehended when he alighted the motorcycle a mere 10 to 15 feet away from SP4. Obviously the accused had carried and transported with him that package containing the cannabis. *This posed the question why the accused perpetrated this act*.

[19] It is quite apparent that when the learned trial judge called upon the appellant to enter his defence it was for the sole purpose of listening to the appellant's explanation as to 'why the accused (appellant) perpetrated the act'.

[20] This cannot be the right approach and it was certainly wrong in law. The relevant section that governs criminal trials in the High Court would be s 180 of the Criminal Procedure Code ('CPC'). That section enacts as follows:

> Procedure after conclusion of case for prosecution
>
> 180 (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
>
> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction."

[21] Augustine Paul JCA (now FCJ) writing for the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, had this to say about the phrase 'prima facie case'. This was what His Lordship said at p 315:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal.

[22] Continuing at p 316 of the same case, His Lordship had this to say:

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[23] In *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65, the Court of Appeal defined a prima facie case to mean that there is a case for the accused to answer because the existing available prosecution evidence has sufficiently established the charge. In the words of Gopal Sri Ram JCA (now FCJ) at p 67, the judge sitting alone must 'ask himself the question 'If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the

prosecution case?' If the answer is in the negative, then no prima facie case had been made out and the accused would be entitled to an acquittal'.

[24] By way of a summary, it is correct to say that a prima facie case was made out or the defence ought to be called not because the learned trial judge was interested in knowing why the appellant perpetrated the act of wrong doing but rather because the prosecution's evidence adduced through the witnesses had satisfied the legal tests laid down in *Looi Kow Chai & Anor v Public Prosecutor* and in *Balachandran v Public Prosecutor*.

[25] Notwithstanding the fact that the learned trial judge made references to *Looi Kow Chai & Anor v Public Prosecutor* as well as to *Balachandran v Public Prosecutor* in his judgment as seen at p 52 of the appeal record, that cannot dispel the fear that the learned trial judge wanted to know as to why the appellant perpetrated the act as the sole reason for calling the defence of the appellant.

[26] We hold that what the learned trial judge did was a serious misdirection which entitled us to set aside the conviction forthwith. We were of the unanimous view that the conviction could not stand and had to be quashed.

THE THIRD GROUND

[27] This concerns the standard of proof and it is worded in this way. That the learned trial judge applied the wrong standard of proof in the context of appreciating whether the defence case had raised a reasonable doubt.

[28] Certainly this ground involves a point of law. The impugned passage in the judgment of the learned trial judge can be seen at p 57 of the appeal record. This was what the learned trial judge said:

> As such this Court had found that the accused had failed, on balance of probabilities, to rebut the presumption of trafficking now applicable against him. *His explanation could not be accepted as having successfuly discharged the evidential burden now required of him, to raise a reasonable doubt on the prosecution's case*.

[29] Now, what the learned trial judge said was this. That the defence had failed to raise a reasonable doubt on the prosecution's case notwithstanding that the statutory presumption had been invoked. In law, when you talk about evidential burden, you are referring to the particular burden. The learned trial judge did not mince his words. It was an unfortunate choice of words. What he meant in regard to the underlined passage was that the appellant had to discharge the evidential burden or the particular burden of raising a reasonable doubt on the prosecution's case as opposed to rebutting the statutory

presumption on the balance of probabilities which should have been the correct burden of proof for the appellant to discharge. The particular burden of proof has shifted to the appellant. It must be borne in mind that the burden to rebut the statutory presumption on the balance of probabilities is heavier than the burden of casting a reasonable doubt on the prosecution's case.

[30] The principles of law have been lucidly explained by Mohamed Azmi SCJ in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169. Incidentally, this case was also referred to by the learned trial judge in his judgment. Now, writing for the Supreme Court, this was what Mohamed Azmi SCJ had to say in regard to the current law at p 171 of the report:

> It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

[31] Had the learned trial judge dutifully followed the advice of Mohamed Azmi SCJ in *Mohamad Radhi bin Yaakob v Public Prosecutor* he would not have erred and he would have applied the correct burden of proof after invoking the statutory presumption under s 37(da) of the Dangerous Drugs Act 1952.

[32] We conclude by saying that all these misdirections by the learned trial judge had seriously disadvantaged or prejudiced the appellant. It is a fine line between what is fair comment and what is not. Unfortunately, here the fine line has been breached. By way of an illustration, we propose to cite three authorities to show that fine line. Thus, in *Rex v Leckey* [1944] 1 KB 80, it was held that the judge should not comment adversely upon the fact that the defendant, after having been cautioned in the usual terms by a police officer, did not deny that he had committed the offence, or said he had nothing to say until he had seen a solicitor, or declined to make a statement before he has had advice. In *Anthony James Hoare* (1966) 50 Cr App R 166, the judge made strong comments on the failure of the defendant to disclose an alibi prior to the trial and had not warned the jury that he was under no obligation to disclose his defence, and the conviction, upon appeal, was quashed. We are constrained to say that it is appropriate to follow the guidelines set out by the Court of Criminal Appeal with a coram of Justices Humphreys, Asquith and Cassels

where Humphreys J, by way of a dictum in the case of *George Edward Tune* (1944) 29 Cr App R 162, at p 165 aptly said:

> It is probably better, where a person has been charged with a criminal offence after having been cautioned and has either made no answer at all, or has made some observation which in itself is not in the nature of an explanation of the charge, that the presiding judge should say nothing about it beyond telling the jury exactly what was said or not said on that occasion, because many observations of different sorts by learned judges have from time to time been made the subject of appeals to this court. If nothing is said by way of comment by the presiding judge, no point can be raised.

[33] For the reasons adumbrated above, we were satisfied that the conviction of the appellant was unsafe and should be set aside. We accordingly made those orders as stated in para (3) of this judgment.

Appeal allowed.

Reported by Ashok Kumar